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IN THE
Supreme Court of the United States

October Term, 1948

No.

LEROY J. LEISHMAN,

Petitioner,

vs.

THE RICHARDS & CONOVER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of Matter Involved.

**A. BRIEF HISTORY OF THE LITIGATION CULMINATING
IN THE PRESENT CONFLICT.**

This proceeding arises out of a patent infringement suit brought in the Western District of Oklahoma by petitioner against respondent, The Richards and Conover Company, alleging infringement of claims 7 to 11 of petitioner's U. S. Patent No. Re. 20,827 through the sale of Motorola radio receiving sets manufactured by the Galvin Manufacturing Company and containing automatic push button tuning devices made by the Radio Condenser Company and General Instrument Corporation.

The patent here involved is a simple one having a specification of only three columns. Yet the patentee-

petitioner has been unable in ten years of litigation to have the issues of validity and infringement authoritatively adjudicated. The same five claims have been the subject of four infringement suits. As matters now stand, the patent is valid but not infringed in the Ninth Circuit, but would, if valid, be infringed in the Tenth Circuit. The Ninth Circuit case of *LeRoy J. Leishman v. Radio Condenser Company and General Instrument Corporation* is at present the subject of a Petition for Rehearing of Order on Petition for Writ of Certiorari, Case No. 372, October Term, 1948.

The first of the said four cases was that of *Leishman v. Associated Wholesale Electric Company*, considered by this Honorable Court in 318 U. S. 203, in which this Honorable Court granted certiorari to interpret Rule 52b, F. R. C. P., as to whether the appeal was taken in time, but denied certiorari to review the case after the appellate court acted upon the appeal (320 U. S. 794). The fourth case was filed against petitioner under the Declaratory Judgment Act by General Motors Corporation in the United States District Court for the Southern District of California, Civil Action 5781-M, where Presiding Judge McCormick, having tried the case, is withholding his opinion to see whether this Honorable Supreme Court decides the issues of validity and infringement in this case and *Leishman v. Radio Condenser, et al.*, Supreme Court, Case No. 372.

The confused situation that now requires the supervisory attention of this Honorable Court, can best be presented if petitioner first sets forth the relationship of this case to the previous two.

In the first case (*Leishman v. Associated Wholesale Electric Co., supra*) the lower court held that the claims

were invalid for want of invention. (36 Fed. Supp. 804, 809.) On appeal, after this Honorable Supreme Court ruled that the appeal was timely, the Court of Appeals for the Ninth Circuit wiped out the holding that the claims were invalid for want of invention, but held that infringement was avoided because the accused tuners were operated by plungers instead of levers as shown in the patent.

Inasmuch as this Honorable Court has said in Rule 38 (5b) and elsewhere that it will review patent cases when a conflict develops between circuit courts of appeals, petitioner then undertook to develop such a conflict by filing the instant action in the United States District Court for the Western District of Oklahoma, alleging infringement by push button radio tuners that were patentwise the same as those accused in the Ninth Circuit case of *Leishman v. Associated Wholesale Electric Company, supra*, in which the appellate court held that the substitution of plungers for levers avoided infringement.

The manufacturers of the devices involved in the Oklahoma action then endeavored to prevent petitioner from obtaining an independent adjudication outside the Ninth Circuit, and these manufacturers accordingly filed the third suit, *Radio Condenser Company, et al. v. Leishman*, which was a Declaratory Judgment Action. In that case a summary judgment of non-infringement was requested on the ground that the earlier decision in the *Associated* case, *supra*, although not *res adjudicata*, was nevertheless *stare decisis*.

Before the lower court in that case acted in the summary judgment proceeding, the trial of the instant case was held, and the trial court held the claims *clearly valid and clearly infringed*.

Subsequent to the entry of the lower court's judgment herein, the lower court in *Radio Condenser Company, et al. v. Leishman* granted the motion for a summary judgment of *non-infringement* on the basis that the *Associated* decision, *supra*, was controlling. This judgment was affirmed by the Court of Appeals for the Ninth Circuit, which re-affirmed its opinion in the *Associated* case, *supra*. The summary judgment case of *LeRoy J. Leishman v. Radio Condenser Company and General Instrument* (167 F. 2d 890) is currently the subject of a Petition for Rehearing of Order on Petition for Writ of Certiorari, Case No. 372, October Term, 1948.

In the instant case, the Court of Appeals for the Tenth Circuit reversed the lower court on the issue of validity, but supported the lower court's views on infringement, as fully set forth in the argument in the Brief in Support of the Petition for Rehearing of Order on Petition for Writ of Certiorari, pages 15 to 18, Case No. 372, *supra*.

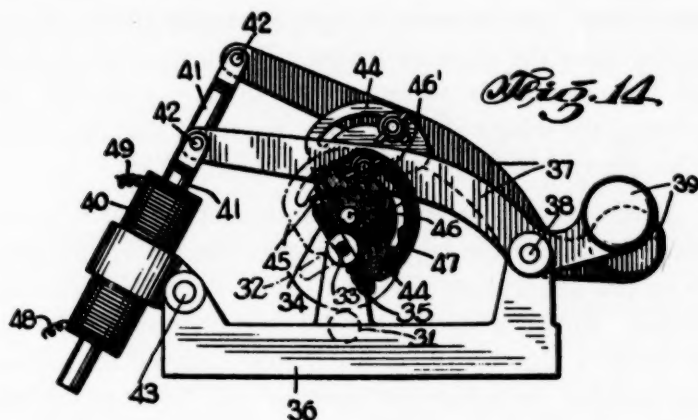
As previously stated herein, the claims are thus valid but not infringed in the Ninth Circuit, but would, if valid, be infringed in the Tenth Circuit. The issue of infringement is accordingly raised in the petition for a writ of certiorari in the Ninth Circuit case, while the present petition is concerned with the issue of validity.

B. THE SUBJECT MATTER OF THE PATENT IN SUIT.

The patent here at issue pertains to automatic push-button tuning devices for radio receivers. The type of push-button tuner covered by the claims here at issue is used in the radio receivers installed by automobile manufacturers in all current models of radio-equipped automobiles excepting Packard, Studebaker and certain models in the Chrysler line.

The five claims that have been involved in the four infringement suits previously mentioned, cover the features of the invention that make push-button radio tuners easy to adjust or "set" so that the subsequent operation of the buttons will tune in the desired stations accurately.

The difficulty that needed to be overcome in order to permit easy setting, is well illustrated in a prior art tuner shown in the Marschalk patent cited by respondent and appearing in the record in Volume II, pages 415 *et seq.* For the convenience of the Court, Fig. 14 from this patent is reproduced on this page. This device employs a rocker 34 (colored green) mounted on a shaft 33 which is operatively connected to the rotatable tuning control of the radio set. This rocker assumes a different tilt, or angular position, according to what station is tuned in. In order



automatically to give this rocker the particular tilt required for a given station, Marschalk employs an adjustable tappet 44 (shown in red). This tappet may be loosened for adjustment purposes by loosening the wing-nut 46'. The next step in the "setting" or adjusting

process, is to tune in the desired station carefully by means of the regular manual knob (not shown). This causes the rocker 34, colored green, to assume a definite angular position. After the rocker has thus been accurately positioned, the operating lever 37 is pressed down so that the tappet 44 engages the rocker and assumes the same angular position. But if the rocker is near either of its extreme tilted positions, such as those shown respectively in full lines and dotted lines in the figure, *the rocker and tappet will both immediately "creep" away from the tilted position and tend to become horizontal.* Great care must accordingly be used in setting Marschalk's tappet. Sufficient pressure must be exerted on the operating lever to assure that the tappet or adjustable means 44 will assume the exact angular position of the rocker, yet a slight excess pressure will immediately destroy the careful setting of the rocker. A variation of a small fraction of one degree will destroy the accuracy of the adjustment. [R. 61-62.] If the operator is fortunate not to have disturbed the setting, the wing-nut 46' may be tightened and the tappet thus clamped in its proper adjusted position.

It will be obvious that any subsequent operation of the lever will cause the tappet to engage the rocker and turn it to the angular position for which the tappet was adjusted. But if the tappet has not been accurately adjusted, or if there was the slightest movement during the adjusting process, the subsequent operation of the lever will not tune in the station properly.

Various workers in the art endeavored to provide a satisfactory adjustable tappet tuner from 1928 until the issuance of petitioner's patent in 1938. Their devices either required many extra parts or involved tedious methods of adjustment.

Petitioner eliminated creeping by the mere shape and relationship of the rocker and tappet, which were mutually arranged so that one could nest within the other in the fully engaged position in order that their axes of rotation might become coincident, or *coaxial*. This is shown in Fig. 2 of the patent [R. 261] and described in the specification on page 264, lines 30 to 34. This structure was immediately adopted on a large scale, and approximately eight million such tuners were manufactured prior to April, 1942, when the manufacture of commercial radio receivers was stopped by federal order to facilitate concentration on the defense program.

C. THE OPINIONS OF THE COURTS RESPECTING VALIDITY.

In the first suit in which the claims here at issue were involved, the trial court misunderstood the nature and purpose of the coaxial relationship and held the claims invalid for want of invention, saying:

"Coaxial, simply means on-center and is some times referred to as concentric or symmetrical. The importance of the mechanical relationship is well known in the art and a feature that must be considered in all machine designing when you desire parts to move together harmoniously and free from friction. The same principle is used in the crank shaft of any automobile. It is a mechanical principle that is hundreds of years old." (36 Fed. Supp. at 808.)

On appeal, petitioner showed the Court of Appeals for the Ninth Circuit that *coaxial* is not synonymous with *on-center*, *concentric* or *symmetrical*; that the coaxial

relationship requires the coincidence of two independent axes of rotation; that the same principle is *not* used in the crank shaft of an automobile, which has *only one axis*; and that the old uses of coaxiality “when you desire parts *to move together harmoniously and free from friction*” are of no pertinence here, because coaxiality is used in the patent in suit for the *diametrically opposite* purpose of *preventing absolutely all rotation*. The Court of Appeals accordingly said:

“* * * The judgment declares that the claims ‘are invalid for want of invention.’ In the view we take, the declaration is unnecessary. As to its correctness or incorrectness, we express no opinion.

“The judgment is modified by striking therefrom the above quoted declaration”

Leishman v. Associated Wholesale Electric Co., 137 F. 2d 722, at 727, 728.

While this opinion of the Court of Appeals for the Ninth Circuit thus did not specifically reverse the lower court, it had the same effect, for it restored the presumption of validity to the patent. Furthermore, it must be assumed that the findings of the lower court, which dealt only with the issue of invention, were clearly in error, because Rule 52a requires that the trial court’s findings must not otherwise be disturbed.

The U. S. District Court for the Western District of Oklahoma in *Leishman v. The Richards and Conover Company*, Civil Action No. 2155, subsequently held these claims to be *clearly valid* and clearly infringed by tuners

that were patentwise the same as those accused in the *Associated* case, *supra*. [Finding of Fact 6, R. 29.]

On appeal, the Court of Appeals for the Tenth Circuit rendered two opinions reversing the trial court in Oklahoma on the single issue of validity.

In the first of these two opinions [R. 497 *et seq.*], the appellate court recognized that the purpose of the coaxial relationship was to prevent unwanted movement at the time of adjustment, but held the claims invalid because

“The principle of coaxial relationship and its importance where it is desired that two parts of a machine operate together harmoniously, has been within the knowledge, for many years, of ordinary mechanics skilled in the art.”

Petitioner asked for a rehearing [R. 513 *et seq.*], pointing out that petitioner's *diametrically opposite* use of a coaxial relationship *to prevent movement*, was not within the knowledge of ordinary mechanics skilled in the art.

The Court of Appeals for the Tenth Circuit then rendered another opinion [R. 576] assertedly explaining the first, but in this second opinion the court ignored the expert testimony of both sides and based its opinion upon incorrect and irrelevant dimensions and relationships in erroneous analytical drawings made by the court. These drawings contain errors so serious that it is impossible to use them as a proper basis for an opinion. These errors, once pointed out, are obvious, and are called to the Court's attention in the Argument in the appended brief.

The Supreme Court Has Jurisdiction to Review the Decision of the Court of Appeals for the Tenth Circuit.

Petitioner relies upon Section 240 of the Judicial Code, corresponding to Title 28, U. S. C. A., paragraph 1254, and also Rule 38(5b) of the Rules of the Supreme Court.

The Question Presented.

1. Are claims 7 to 11 of Reissue Patent No. Re. 20,827 invalid for want of invention?

Reasons Relied Upon for Allowance of the Writ.

1. The action of the Court of Appeals for the Tenth Circuit in reversing the lower court's holding that claims 7 to 11 of Reissue Patent No. Re. 20,827 are valid, and in ruling that these claims are invalid for want of invention, has created a situation that is in conflict with the situation in the Ninth Circuit where the Court of Appeals in *Leishman v. Associated Wholesale Electric Company*, 137 F. 2d 722, at 727-728, struck out the holding of the lower court that these claims were invalid for want of invention and thus restored the presumption of validity to the patent.

2. The two opinions of the Court of Appeals for the Tenth Circuit herein are not proper judicial determinations of the issue of invention, and contain serious judicial errors that are apparent upon the face of the opinions themselves.

a. In correctly explaining in its first opinion that coaxiality of the tappet and rocker is for the purpose

of *preventing movement*, and then ruling that no invention is involved because the coaxial relationship has been known for many years "where it is desired that two parts of a machine *operate together harmoniously*," the appellate court failed to distinguish between two things that are *diametrically opposite*.

b. In its second opinion, purporting to explain the first, the appellate court based its reasoning upon seriously incorrect measurements in improper drawings prepared by the Court.

3. The method used by the Court of Appeals of the Tenth Circuit in arriving at its opinion with respect to invention, is a departure from established practice and not in conformity with the methods followed and approved by this Honorable Supreme Court.

a. The appellate court ignored the admissions of the expert witness opposing the patent, brushed aside the arguments that respondent advanced against validity, and proceeded *sui sponte* and incorrectly to analyze the problem solved by petitioner's combination.

Prayer for the Issuance of the Writ.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Court had in the case numbered and entitled Docket No. 3577, *The Richards and Conover Company*, appellant, *v. LeRoy J. Leishman*, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals for the Tenth Circuit be reversed by this Honorable Court, and for such other relief as to this Court may seem proper.

Dated this 25th day of February, 1949.

LEROY J. LEISHMAN,

By JOHN FLAM,

Counsel for Petitioner.

Certificate.

This petition is in my judgment well founded, and is not interposed for delay.

JOHN FLAM,

Counsel for Petitioner.

IN THE
Supreme Court of the United States

October Term, 1948.

No.

LEROY J. LEISHMAN,

Petitioner,

vs.

THE RICHARDS AND CONOVER COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Publication of Opinions of Lower Courts.

The opinion of the District Court was an unreported memorandum opinion, but the findings of fact may be found in Vol. I, page 28 *et seq.*

The two opinions of the Court of Appeals for the Tenth Circuit, 79 U. S. P. Q. 316 and 80 U. S. P. Q. 338, appear in Vol. II of the record beginning on pages 497 and 576, respectively.

II.

Argument.

In case No. 372, October Term, 1948, the Petition for Rehearing of Order on Petition for Writ of Certiorari showed that there is a conflict between the Courts of Appeals for the Ninth and Tenth Circuits with respect to the infringement of the instant patent by the very same devices. The present petition has shown that there is also a conflict between these two appellate courts regarding the validity of the claims here at issue. This Honorable Supreme Court's policy of resolving such conflicts is too well known to require the citation of authorities.

The reasons relied upon for allowance of the writ in the instant case includes the following cogent additional reason why this Honorable Court should review the opinions of the Court of Appeals for the Tenth Circuit on the issue of validity:

"2. The two opinions of the Court of Appeals for the Tenth Circuit herein are not proper judicial determinations of the issue of invention, and contain serious judicial errors that are apparent upon the face of the opinions themselves."

It was shown in the statement of the case in the foregoing petition that the first of these two opinions based the holding of invalidity upon the paradoxical contention that no invention is involved in petitioner's use of a coaxial relationship to *prevent* rotation because this relationship has long been used to *facilitate* harmonious movement. The impropriety of this first opinion is thus apparent upon its face and needs no supporting argument.

The appellate court's second opinion, rendered after the rehearing, comes squarely within the provisions of

Rule 38, subdivision 5(b) of this Honorable Court, which permits a review on Writ of Certiorari where a Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this court's power of supervision."

The present case exemplifies just this condition. The Court of Appeals for the Tenth Circuit, in rendering its opinion on rehearing, dated January 20, 1949 [R., Vol. II, p. 576 *et seq.*], is palpably very much in error.

It is not permissible for an appellate reviewing court to improvise, or to attempt, a new technical explanation of the behavior of a mechanical device, and which is contrary to all the testimony of the expert witnesses. And this is all the more improper where this new court-made theory is made the basis of a reversal of the lower court on a fact issue.

The Court of Appeals exhibits an utter disregard of all of the said expert testimony—testimony that amounted to serious and conclusive admissions on behalf of the appellant.

Substantially the entire opinion is an attempted explanation of the mode of operation of the prior art device shown in the Marschalk patent discussed in the Statement of the Case in the foregoing petition. The Court's volunteered analysis of the reasons for "creeping" in Marschalk's device are obviously and clearly wrong.

On page 2 of the opinion [R., Vol. II, p. 577], the Court says:

"On rehearing, counsel for Leishman urged that the cause of creeping in Marschalk's device is obscure; and that neither such cause nor the solution of the problem would readily occur to a mechanic skilled in the art."

The court then refers to two figures prepared by the court and appearing on page 578 of the record. These figures are intended to illustrate the Marschalk device; the rocker I, tappet J, lever H, and pin A for the tappet are intended to represent the corresponding parts 34, 44, 37, and 46, respectively, in Marschalk.

The opinion then goes on to explain why there is "creeping" in such a device. It stresses, for example, the relative positions of pin A and an imaginary line XY, a line having no counterpart in Marschalk; nor does the Marschalk tappet have an apex that falls in any imaginary line. No reason is given why such a relation of the pin A, line XY, and the apex of tappet G is important; in fact, there is no pertinence to it whatever.

In order more readily to point out other serious errors in the appellate court's procedure, the drawings from the opinion are reproduced on the folding insert at the back of this brief, where additional lines have been superimposed upon the Court's figures for purposes of explanation.

On page 579 of the record, the opinion says:

"When the rocker and the tappet are positioned as in figure 1, pin A is a greater distance above the axis of the rocker shafts and a greater distance to the right of the vertical line XY than when the rocker and tappet are positioned as in figure 2."

This condition, to which the Court later attaches great significance, is apparent only because the Court has made grievous errors in its drawings that a mechanic would never make. It will be noted that the Court has inadvertently placed the pin A in the wrong place in its Fig. 1. The tappet, of course, could not change its construc-

tion in turning from the position shown in Fig. 2 to the position shown in Fig. 1. The pin A would, accordingly, be *exactly the same distance* away from the lower edge of the tappet in both Figs. 1 and 2. To demonstrate the serious error that misled the Court, a circle has been drawn around the pin A in Fig. 2 on the insert at the back of this brief, the circle being of such size that its lower edge comes exactly to the edge of the tappet. A circle of exactly this same size has been drawn around the pin A in the Court's Fig. 1. *It will be noted that this circle comes a very long way from the edge of the tappet.* This large error in the Court's drawing is what makes the axis of the tappet and the axis of the rocker seem so much further apart in its Fig. 1 than in its Fig. 2.

To show that the Court's conclusions about these axes are largely the result of the serious errors that it has made in endeavoring to simulate what a skilled mechanic would do, the tappet and rocker of Fig. 1 have been properly redrawn as Fig. 3 between the two figures from the opinion. It will be noted that the rocker is tilted at exactly the same angle as in the Court's Fig. 1, but the tappet has been correctly drawn so that the pin A is precisely the same distance from the lower edge of the tappet as it is in Fig. 2, as shown by the circle around the pin. When the figure is thus accurately laid out, *the variation in the distance between the axis of the tappet and the axis of the rocker in Figs. 2 and 3 is barely discernible.* Yet the grave incongruity in *the Court's* drawing is made the important reason assigned by the Court for the "creeping," for the Court says (page 580):

"Since the more the rocker is tilted [as in Fig. 1] the greater becomes the non-coaxiality between the axis D of the rocker shafts and pin A and the greater becomes the tendency of the rocker to creep,"

All these glaring errors are further aggravated by the statement at page 581:

"Counsel for Leishman contend it is manifest that the cause of creeping is obscure because an expert witness for the defendant below testified that if the line of thrust from pin A is either to the left or right of the axis of the rocker shafts, creeping will occur, and that Leishman's physical exhibits 26, 26A, 26B, and 26C demonstrate that if pin A is not coaxial with the rocker shafts, although the pin travels downward in a line of thrust which intersects the axis of the rocker shafts, creeping will still result.

"It is obvious that when the expert so testified he was talking about a force from pin A traveling along a straight line. In Marschalk's device, pin A travels in an arc."

As a matter of fact, the expert witness *was* talking about Marschalk; this testimony occurs at page 213 of Vol. 1 as follows:

"Q. When the force is applied by operation of the lever 37 in Figure 14 of Marschalk, it is always applied to the left side of that pivot 33, is it not, on account of the location of the pins, 46, upon which the tappet is mounted? A. The direction of the force that will cause creeping can be found in the following manner: Draw a straight line from pivot 38 to pivot 46. Then draw another line at right angles to that line through pivot 46. The force will lie along that perpendicular line. If it falls to the left of pivot 33 then the rotation of the rocker will be counter clockwise. If the perpendicular line on the other one falls to the right of pivot 33, then there will be clockwise motion."

The opinion is interlarded with other incorrect statements. It is stated, for example, on page 580, that the lever from point B to pin A is longer than the lever from point O to pin A (point O is not even marked on the diagram, but it evidently coincides with the point C). Apparently the opinion attaches significance to the fact that the right-hand edge of the tappet in Fig. 1 overlaps the rocker edge, making line AC shorter than line AB. Even if these "lever arms" were identical, creeping would yet occur. This was amply demonstrated to the Court of Appeals by the aid of Exhibits 26a, b, c, and d. This series of exhibits includes a rocker similar to rocker I, a tappet similar to petitioner's tappet, and a tappet which has an axis non-coaxial with the rocker axis when the tappet and rocker are in full engagement. Although both sides of the latter tappet extend completely beyond the edges of the rocker I, creeping nevertheless occurs, and can be demonstrated by the aid of these models. The Court of Appeals is therefore incorrect in attaching significance to an inconsequential and immaterial feature, that is, that the right-hand edge of the tappet J in Fig. 1 extends beyond the edge of the rocker I.

A procedure of this sort by a reviewing tribunal, leading to a reversal of a fact finding of the District Court, is contrary to proper judicial procedure. The lower court had found the claims of the patent clearly valid and clearly infringed. This appears in the Record, Vol. 1, page 29, Finding 6.

"Claims 7, 8, 9, 10, and 11 of the reissue patent No. 20,827 are clearly valid, and clearly infringed."

In spite of this unequivocal fact finding by the District Court, the Court of Appeals substituted its own *new* findings of a highly technical nature. These *new*

technical findings have no support whatever in the record, and are tantamount to the complete discarding of the expert evidence in the case.

Actually, the causes of "creeping" were obscure and defied analysis until the petitioner taught the remedy for the difficulty.

An appellate court of review is not permitted to reverse a case on the basis of a newly advanced theory never urged before. See, for example, *Thomas et al. v. Taylor*, 224 U. S. 73, 56 L. Ed. 673. In that case, appellants urged that the reviewing court should have reversed the trial court so as to permit appellants to introduce evidence in support of a different theory of the cause of action. This Honorable Court, at page 84, however, stated:

"Besides, judgment cannot be reversed upon the mere suggestion that, upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result."

The present case is a greatly aggravated instance, for the new evidence was actually furnished by the reviewing tribunal itself; nor was there even any intimation at the hearings that such an analysis of the "creeping" difficulty would ever be attempted by the reviewing court.

Had an expert, at the proper time and place, offered evidence of this character, petitioner would have been able to exercise his right of cross-examination. Such cross-examination would have demonstrated the utter untenability of such assertions. But this right has been denied to petitioner.

There are numerous instances in which this Honorable Court reversed a decision or opinion that is clearly wrong on its face, as here. Of many of these decisions, the

following might be cited: *Reynolds v. United States*, 222 U. S. 443, 54 S. Ct. 800, 78 L. Ed. 1353. This case involved the question of the right of a veteran to receive all of his pension, without deductions for hospitalization. Although the question was not of great public importance, yet, because of the obvious errors in the decision, this Honorable Court reversed it.

Of similar import are *Southern Railway v. Walters*, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239; *Stringfellow v. Atlantic Coast Line*, 290 U. S. 322, 54 S. Ct. 175, 78 L. Ed. 339; *Van Der Weyde v. Ocean Transport Co.*, 297 U. S. 114, 56 S. Ct. 392; *Alford v. United States*, 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624; and *McBoyle v. United States*, 283 U. S. 25, 51 S. Ct. 340, 75 L. Ed. 816.

Should this wrong decision be left to establish a precedent, then any reviewing court may disregard the entire record of expert testimony, and may volunteer its own inaccurate expert evidence.

Conclusion.

Because of the conflict between the Courts of Appeals for the Ninth and Tenth Circuits hereinbefore set forth, and because of the departure of the latter court from established and proper judicial procedure, it is respectfully submitted that this case is one calling for this Court to resolve the conflicts and to exercise its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the court below.

LEROY J. LEISHMAN,

Petitioner,

By JOHN FLAM,

Counsel for Petitioner.